Supreme Court, U.S.
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No. 99-1232

IN THE
SUPREME COURT OF THE UNITED STATES

GRAND RAPIDS PLASTICS, INC.
Petitioner,

vs.

CRAIG M. LAKIAN, JAMES CHAPMAN,
H&L ENGINEERING, INC.,
and PINE RIVER PLASTICS, INC.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS JAMES CHAPMAN and H&L ENGINEERING, INC. IN OPPOSITION

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COUNTER QUESTIONS PRESENTED FOR REVIEW

1. The petitioner has not demonstrated compelling reasons to grant a writ of certiorari. The Petitioner seeks review of the circuit court's decision affirming the dismissal of petitioner's antitrust claim because the statute of limitations had run. The errors asserted by petitioner consist only of alleged erroneous factual findings and the misapplication of properly stated rules of law.

2. The Petitioner has made misstatements in its petition regarding the proceedings below. The correction of these misstatements further demonstrates that petitioner's application is without merit.

3. The courts below properly applied this Court's controlling decision in *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971) to dismiss petitioner's tardy antitrust claim.

THE PARTIES

Respondent James Chapman is an individual resident of the State of Michigan. Respondent H&L Engineering, Inc. is a Michigan corporation wholly owned by Respondent Chapman.

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COUNTER STATEMENT OF THE CASE

INTRODUCTION

There are no special or important reasons for granting petitioner's request for writ of certiorari. The issues presented do not involve a conflict of authority in the lower courts. The decision below was based upon the application of settled principles of law to the particular facts of this case. The circuit court's decision does not concern important questions of federal law unsettled by this Court, and does not conflict with decisions of other United States courts of appeals or relevant decisions of this Court.

Moreover, the petition makes misstatements of fact and law. Petitioner asserts, as if it were undisputed, that respondents paid or received "bribes" and "kickbacks". To the contrary, respondents presented unrefuted testimony from all the alleged participants denying that any such illegal conduct took place. Petitioner never presented the trial court with any direct evidence of bribes or kickbacks, but simply argued that it was entitled to infer their existence from circumstances it labelled suspicious. Nor did Petitioner plead, or present any evidence, that the "bribery scheme" alleged in its complaint to have occurred in 1989, mutated or "expanded" over time, even though this argument is the foundation for its claims of error in its petition to this Court.

Petitioner now argues that it was prevented from proving the "expansion" of the alleged "bribery scheme"

to acts occurring inside the limitations period. In making this argument Petitioner misstates the record and the holding of the Sixth Circuit below. Contrary to petitioner's assertion, it never alleged that respondents made any new or continuing agreements to pay illegal commissions for work awarded after 1990. Instead, Petitioner argued below that since Respondent Chapman had split his commissions with Respondent Lakian until 1995 for the work awarded in 1989 and 1990, each new payment from Chapman to Lakian was a fresh violation of the antitrust laws. Before now, Petitioner never argued that after 1989 respondents ever made any new agreement to split commissions. No evidence of any such new agreement was ever presented.

The Sixth Circuit never "acknowledged that Petitioner may be able to establish a nexus between the 1994 and 1998 model year awards and the concurrently paid bribes." Petition for Writ at 11-12. The only thing the Sixth Circuit acknowledged was petitioner's argument (in the face of direct evidence to the contrary by person who awarded the work) that the earlier alleged bribes smoothed the way for the later bribe-free award of work to its competitor:

> "Although Grand Rapids does not allege that Chapman and Lakian entered any agreement regarding the 1994 work or the 1998 work, it argues that a jury could infer that the money paid to Lakian for the 1989 and 1992 work also insured that Pine River would receive the 1994 and 1998 work. Nevertheless, even if

> Grand Rapids offered evidence at trial that allowed the jury to make this inference, Grand Rapids's subsequent failure to obtain the 1994 and 1998 work, awarded in 1992 and 1994, respectively, does not start the statute of limitations running. "For statute of limitations purposes, the focus is on the timing of the causes of injury, i.e. the defendant's overt acts, as opposed to the effects of the overt acts." [*DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462 (6th Cir. 1996)] at 467. Grand Rapids's failure to obtain the 1994 or 1998 work, if in fact a result of the commission payment scheme, merely constitutes an effect of the overt act, i.e. the payment scheme, and therefore does not restart the statute of limitations." Petition for Writ at appendix 7.

The Sixth Circuit's decision affirming the dismissal of Petitioner's complaint was correct. The award of later work to Respondent Pine River, assertedly as the result of commissions paid on the earlier work, does not amount to a new and independent act by respondents, and does not fall within the "continuing violation" exception to the statute of limitations.

The Sixth Circuit also correctly dismissed Petitioner's claims against Respondent Lakian even though he never raised the statute of limitations as a defense or filed a motion for summary judgment. The other respondents did raise this defense, and did move for summary judgment. Petitioner was "on notice that she had to come forward with all her evidence." *Celotex Corp. v. Catrett*, 477 U.S.

317, 326 (1986). Indeed, Petitioner does not now suggest what difference it would have made if Lakian had also raised the statute of limitations defense, or how it would have responded differently to a motion for summary judgment made by Lakian. The Court should also note that Petitioner never raised this argument in the trial court, despite filing a motion for reconsideration of the dismissal of all its claims.

Reasons For Denying the Writ

I. Petitioner Has Failed to Demonstrate Why the Petition for Writ Should be Granted, and This Case Does Not Merit the Court's Review

A Petition for Writ of Certiorari should explain to this Court the important reasons why review should be granted. Petitioner fails to make the required showing. It simply asserts that the Sixth Circuit properly stated, but misapplied, this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). It complains that the Sixth Circuit rejected its argument that each payment from Respondent Chapman/H&L to Respondent Lakian was an independent wrongful act that started the statute of limitations running. Nowhere does Petitioner even attempt to articulate any reason for this Court to exercise its supervisory power over this case.

The Petition for Writ makes two arguments. Petitioner argues that the Sixth Circuit misapplied the "continuing

violation" doctrine in dismissing its hypothetical claim that alleged bribes before the limitations period may have influenced the later award of work inside the limitations period. In the courts below Petitioner did not allege or offer any evidence that respondents had made any agreements or paid bribes regarding the 1994 or 1998 work. Instead Petitioner argued that the money paid to Respondent Lakian for the 1989 and 1992 work also insured that Respondent Pine River would receive the 1994 and 1998 work, by predisposing the buyer to favor Pine River. As noted by the trial court and the Sixth Circuit, Petitioner presented no proofs of this claim, which was never pleaded and was raised for the first time in response to the motion for summary judgment. Petition for Writ at appendix pp. 7, 29-56. Petitioner argued below that "a jury could infer" that the earlier payments "influenced" the later award of work. Now Petitioner argues that the courts below ignored its proofs regarding "the expansion of the bribery scheme to new programs," Petition for Writ at 8. In fact it presented no such proofs. To the contrary, Respondents presented substantial *unrefuted* evidence that no bribery or influence peddling ever occurred.

Petitioner's arguments below were based on the notion that each alleged "bribe" payment caused it separate injury. Petitioner cited no case to support this contention. The district court and the circuit court both rejected this argument, pointing out that the *timing* of the payments was not the cause of injury. If there was any

injury, it happened when the supposed *purpose* of the "scheme" was accomplished: the 1989 and 1990 award of work to Respondent Pine River, and not to Petitioner. The Sixth Circuit fully analyzed the point:

> "Grand Rapids argues that each payment to Lakian, which continued through 1995, was an independent wrongful act that started the statute of limitations running. However, even if the payment agreement constituted a continuing violation of the Robinson-Patman Act, the individual payments to Lakian were only a manifestation of the previous agreement. The individual payments therefore do not constitute a "new and independent act," as required to restart the statute of limitations." Petition for Writ at appendix 6. (internal citation omitted).

Additionally, Petitioner asserts that its claim against Respondent Lakian should not have been dismissed because Lakian never pleaded the statute of limitations as an affirmative defense, and therefore waived it. Petition for Writ at 19-20. Petitioner never mentions this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), cited by the Sixth Circuit, in which this Court pointed out that a district court may enter summary judgment *sua sponte*, "so long as the losing party was on notice that she had to come forward with all her evidence." *Id.* at 326. The summary judgment motions filed by Lakian's co-defendants seeking dismissal of Petitioner's complaint under the statute of limitations, an argument which applied to all of Petitioner's claims against all the defend-

ants, put Petitioner "on notice to come forward" with all its evidence to oppose the motions. Petitioner presented everything it could to avoid dismissal. It does not explain what it would have done differently if Lakian had amended his affirmative defenses and filed his own motion for summary disposition. Nor does Petitioner explain how *Celotex* is inapplicable.

II. Petitioner Has Misstated the Facts of the Case and The Proceedings Below

Petitioner misstates the facts and law of the case. Respondent is required by Supreme Court Rule 15.2 to point out any perceived misstatement made in the Petition.

No Evidence of Bribes or Kickbacks

Throughout it Petition, Petitioner refers to "bribes" and "kickbacks" as if their existence were undisputed facts. This is not the case. The district court found Petitioner's bribery case had no direct factual support, and was contradicted by substantial unrebutted evidence submitted by respondents:

> "[I]n addition to a lack of evidence that the payments involved work beyond the 1992 model year, the Court detailed at length in its written opinion the lack of

> evidence indicating that Lakian had any influence over the actual placement of Daikyo-Decoma work after he left its employ in 1990. (*Id.* at pages 12-18). All of the officers of Daikyo-Decoma responsible for placing the work testified that Lakian was not involved and did not influence the placement of work to Defendant Pine River. It was the sworn testimony that they, and they alone, made the decisions awarding the work. Neither is there any evidence that Lakian was paying anyone at Daikyo. There is simply no evidence that Lakian had influence over, or did in fact influence, the placement of work to Defendant Pine River after 1990, in exchange for payments from Chapman." Petition for Writ at appendix pp. 78-79.

The respondents submitted deposition testimony and affidavits from all the persons employed at Daikyo-Decoma whom Petitioner had identified as subject to Lakian's "influence." Every one of these persons denied that Lakian, or anyone else, influenced their decisions about where to place work. Every one of these persons denied that they had been bribed. Every one of these persons affirmed that they awarded work both to Petitioner Grand Rapids Plastics and to Respondent Pine River Plastics solely on the basis of free, fair and open assessment of the capabilities and experience of the companies, the quality of the work, and the prices quoted. Petition for Writ at appendix pp. 49-53. Petitioner did not present any evidence of any payments to anyone at Daikyo-Decoma.

No Evidence That Petitioner's Bid Was "More Competitive"

Petitioner asserts at page 5 of its Petition for Writ that "its bid on the 1998 model year work was more competitive" than Respondent Pine River's. There is no record evidence to support this assertion. Petitioner never submitted any evidence showing either its bid on the 1998 work, or Pine River's bid on the 1998 work. No evidence was ever submitted by any party comparing the bids submitted for the 1998 work by Pine River and Grand Rapids, or analyzing whether one was more "competitive" than the other. There is evidence on the record, however, that *all* the work awarded by Daikyo-Decoma, whether to Pine River of to Grand Rapids, was done so on the basis of "an evaluation of the quality, efficiency, delivery, and prices of Grand Rapids Plastics and Pine River." Petition for Writ at appendix 53. The record does not support the assertion that Petitioner's bid was "more competitive."

Petitioner Was Not Recognized as a Higher Quality Supplier

Petitioner also asserts at page 5 of its Petition for Writ that "it was recognized as a higher quality provider" than Respondent Pine River. The district court described this assertion as an "exaggeration." Petition for Writ at appendix 44. The record evidence shows that both companies were considered equal in quality. In rejecting Petitioner's assertion of superior quality, the district court noted:

"Mr. Harada, head of Daikyo-Decoma from 1990 to 1994 and the person responsible for choosing suppliers, testified that both companies were 'excellent in quality, delivery and cost.'" Petition for Writ at appendix pp. 44-45. Petitioner was not "recognized" as a higher quality supplier than Pine River.

No Proof of Abnormal Procedures in Awarding 1998 Work

In yet another misstatement at page 5 of its Petition, Petitioner states that "a Daikyo-Decoma employee, Doug Clements" testified about abnormal bid evaluation procedures for the award of the 1998 work by Daikyo-Decoma. In fact, Clements never worked for Daikyo-Decoma. Daikyo-Decoma was out of business when the 1998 work was awarded. Clements worked for DDM Plastics, a different company. He did not work for Daikyo-Decoma, and had no knowledge of anything that happened there. Moreover, in response to a question from Petitioner's counsel about the award of the 1998 work, Clements testified that he did not have "any factual information" that DDM Plastic's award of work to Pine River was due to bribery. Petition for Writ at appendix 46. There is no evidence of abnormal bid procedures in the award of the 1998 model year work.

Lakian Was Not Paid "Bribes"

Petitioner states at page 6 of its Petition that "Lakian was actually paid bribes on the 1990 transfer work, the 1992 model year work, and the 1994 model year work." The facts of record are different. Chapman split with Lakian the commissions he earned from Pine River for the 1990 transfer work and the 1992 model year work. Respondents have contested that this splitting of commissions was "bribery" because Lakian did not make or influence the decision to select Pine River as a vendor to Daikyo-Decoma. See, Petition for Writ at appendix pp. 49-53, where the district court explained that Lakian had no decision-making authority at Daikyo-Decoma, and that all the persons who had authority denied both that Lakian had any input into the decision to select Pine River, and that anyone had bribed or improperly influenced them. Nevertheless, Petitioner has persisted in describing the split commissions as "bribes." In addition, Petitioner conceded in the trial court that it had no evidence of any payments to Lakian or anyone else regarding the 1994 model year work by anyone, regardless of what label might be attached.

> "[I]t is not alleged, nor is any evidence presented that Lakian received, or was scheduled to receive, any monies from Chapman, through Pine River, involving the award of the 1994 and 1998 model year work..." Petition for Writ at appendix pp. 38-39.

The facts are that Lakian received *commissions* for the

1990 transfer work and the 1992 model year work; he received *nothing* for the 1994 model year work.

Lakian Was Not "Slated to Receive Additional Bribes"

Petitioner states at page 6 of its Petition for Writ that Lakian "was slated to receive additional bribes" after 1994. Aside from the disputed characterization of the commission payments as "bribes," there is no record evidence to support this assertion. No witness testified and no document referred to any "slating," plan, intent or desire to make "additional" payments, however labelled, to Lakian.

Lakian Did Not Bribe Shinoda

Petitioner asserts that the "bribes" Lakian received were "funnelled" to a Daikyo-Decoma employee named Shinoda. Petition for Writ at 6. However, the district court carefully reviewed the record for evidence of such payments and concluded that the "allegation that Lakian had influence over Daikyo-Decoma work because he was bribing Mr. Shinoda, and/or others is purely speculative." Petition for Writ at appendix 41. After reviewing Petitioner's attempts to create a fact issue on this point, the district court concluded:

"These 'facts' are insufficient to establish, or even

> create an issue of fact, that Lakian was bribing Shinoda, or anyone else at Daikyo-Decoma, or had influence over the placement of the 1994 and 1998 work." Petition for Writ at appendix 43.

Lakian did not bribe Shinoda, or anyone else.

Lakian Did Not Solicit a "Bribe" From Blackstone

Petitioner states that "Lakian solicited a similar bribe from Blackstone in 1992. Blackstone refused." Petition for Writ at 7. These statements misrepresent the record. In fact, Lakian "solicited" a commission payment from Blackstone (Petitioner's executive vice president, not president as stated in the Petition) for work awarded to Petitioner more than a year earlier. Petition for Writ at appendix 47. Blackstone had no objection to paying the commission Lakian requested, provided that Lakian signed on as Petitioner's representative. Petitioner now characterizes this as a request for a "bribe." The circuit court discussed this point in detail:

> In February 1992, Fred Blackstone, Executive Vice President of Grand Rapids, met with Lakian to discuss the possibility of a job. Blackstone stated in his deposition that at the meeting, Lakian demanded payment of commissions on the work he had brought Grand Rapids. Blackstone testified that Lakian told him that he needed a commission to pass on to Daikyo-Decoma's engineering manager, Steve Shinoda.

> Blackstone refused to pay *unless Lakian signed a written agreement to be a Grand Rapids manufacturer's representative*. According to Blackstone, Lakian threatened that if Grand Rapids did not pay the commissions, they would not get any more work from Daikyo-Decoma. Despite the threat, Grand Rapids did almost four million dollars worth of business with Daikyo-Decoma in 1992 under a new contract for production of a rear finisher for which Pine River was not asked to bid. Petition for Writ at appendix 4 (emphasis added).

Not only did Lakian not solicit a "bribe" from Blackstone, Blackstone did not refuse to pay. Blackstone was ready to pay Lakian a commission for the Daikyo-Decoma work, if Lakian signed a manufacturer's representation agreement.

Petitioner's Argument That the Alleged Bribery Scheme "Expanded" is a New Claim

Petitioner argues that the circuit court held that "the expansion of the bribery scheme to new programs" was not an overt act restarting the statute of limitations. Petition for Writ at 8. The circuit court did not make such a holding. Petitioner's argument is based on a false premise. Petitioner never pleaded, argued or presented evidence, that the alleged bribery scheme "expanded." Petitioner's "expansion" theory first appeared in its

Petition for Writ. Not only did the courts below never hear this theory, but there is no evidence on the record to support it. At no time did the circuit court make any holding about "expansion of the bribery scheme," let alone that the "expansion" had any effect on the running of the statute of limitations.

III. The Sixth Circuit Properly Affirmed the Dismissal of Petitioner's Antitrust Claim Because the Statute of Limitations Had Run

A. Petitioner's Claim For Violation Of Section 2(c) Of The Robinson-Patman Act Was Barred By The Statute Of Limitations

The circuit court ruled correctly that Petitioner's Robinson-Patman claim was barred by the statute of limitations. The claim alleged by Petitioner accrued in 1990. Because it did not file its §2(c) claim until 1996, the claim was barred.

1. §2(c) of the Robinson-Patman Act

Section 2(c) of the Robinson-Patman Act provides as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage,

> or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. 15 U.S.C. §13(c).

2. *The Limitations Period for Antitrust Actions Is Four Years*

Section 4B of the Clayton Act sets a four year statute of limitations for private antitrust actions. 15 U.S.C. §15b. The limitations period begins to run when the cause of action accrues, that is, when the plaintiff suffers injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39 (1971) ("Generally, a cause of action accrues and begins to run when a defendant commits an act that injures a plaintiff's business....[E]ach time a plaintiff is injured by an act of the defendant, a cause of action accrues to him to recover the damage caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.")

Petitioner's Robinson-Patman claim was based on an alleged "scheme of bribery." Petitioner claimed in its complaint that the scheme began when Chapman and Lakian negotiated an agreement to split Chapman's commissions from Pine River for the Daikyo-Decoma work. This happened in 1989.

3. Petitioner's Claims Accrued in 1990

Petitioner alleged in its complaint that Daikyo-Decoma awarded work to Pine River because of the commission-splitting agreement between Chapman and Lakian. The wrong Petitioner claimed to have suffered was the loss of Daikyo-Decoma's business. This loss of business took place in 1989 and 1990 when Daikyo-Decoma awarded the transfer work and the 1992 model year work to Pine River. The "last overt act" causing injury or damage to Petitioner was complete when Daikyo-Decoma issued its purchase order to Pine River in August 1990 for the 1992 model year work. The circuit court affirmed the trial court's conclusion that the four year statute of limitations had expired in 1994, and that as a consequence, Petitioner's 1996 complaint was too late.

B. The "Continued Wrongful Acts" Exception Does Not Apply

Petitioner sought to extend the statute of limitations deadline by arguing that respondents had committed "continued wrongful acts" inside the limitations period.

Petitioner pointed out that Chapman/H&L had continued to pay Lakian through 1995, and argued that the continued payments were "wrongful acts" inside the limitations period. The circuit and district courts correctly rejected this argument. The *payments* from Chapman to Lakian did not cause injury to Petitioner, regardless of when they were made. Petitioner's claim was that its injury was caused by the *award of business* to Pine River. Petitioner did not claim that it, and not Lakian, was entitled to a share of the commissions, or that the commissions themselves caused it injury. The "wrongful act" was the diversion of business from Grand Rapids to Pine River. The *dates* that Pine River made payments to Chapman or that Chapman made payments to Lakian were immaterial to Petitioner's claim. The fact that Chapman paid money to Lakian in 1995 on an agreement made in 1989 did not "restart the clock" for the limitations period.

Petitioner did not satisfy its burden to demonstrate that its claims, which were barred by the applicable statutes of limitations on their face, fell within any exception. The circuit court and district court correctly ruled that Petitioner's Robinson-Patman claims were barred.

Conclusion

The Petition for Writ should be denied. This case does not merit consideration by the Court. The fact-driven decision of the Sixth Circuit correctly applied settled principles of law to affirm the dismissal of Petitioner's complaint because the statute of limitations had run.

Respectfully submitted,

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